Office-Supreme Court, U.S.
FILED
AUG 26 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 409

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*

v.

MILDRED L. SMITH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

RICHARD W. GALIHER
WILLIAM E. STEWART
1215 19th St., N. W.
Washington, D. C., 20036

Of Counsel:

HARVEY B. BOLTON, JR.
1215 19th St., N. W.
Washington, D. C., 20036

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA, *Petitioner*

v.

MILDRED L. SMITH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Indemnity Insurance Company of North America, a corporation, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on April 25, 1963.

OPINIONS BELOW

The opinion on rehearing dated April 25, 1963 has not been reported. The first opinion of the court below was rendered November 15, 1962. The case number in the court below was 16,814.

JURISDICTION

The judgment of the court below was entered on April 25, 1963.

A timely petition for a rehearing en banc was denied on May 28, 1963. (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Has the court below disregarded the law of Texas, conceded by the parties to be controlling, and thereby, rendered a decision in conflict with the applicable law of that state?

STATEMENT OF THE CASE

Respondent's husband was killed in an automobile accident near Slidell, Louisiana on February 11, 1959. At the time he was operating a Hertz-U-Driv-It automobile he had rented a few days earlier in New Orleans, Louisiana.

The widow, a resident of Virginia, instituted suit in the United States District Court for the District of Columbia to recover on an insurance policy issued by petitioner to the employer of her husband, which insurance policy was consummated in Texas. This policy insured the life of respondent's husband, and other executives who were employed by the National League

of Insured Savings Associations, for death occurring while the insured was engaged in the course of the business of his employer, and while the insured was riding in:

(a) any civil aircraft, provided such aircraft (1) is operated by a properly certificated pilot, (2) has a current unrestricted airworthiness certificate, and (3) is not being used for fire fighting, pipe line inspection, aerial photography or exploration;

(b) any aircraft operated by the Military Air Transport Service (MATS) of the United States of America, or any similar airline operated on a scheduled basis by the military authorities of any other nation;

(c) any land conveyance licensed for the transportation of passengers for hire while traveling directly to or from an airport immediately preceding departure or immediately following arrival of an aircraft used by or to be used by the Insured solely as a passenger.

The critical question before the courts deciding the case was whether the insured, while driving a Hertz type vehicle, could be considered within the purview of section (c), or more specifically, could a U-Drive-It vehicle be included in the phrase "licensed for the transportation of passengers for hire." The parties agreed that the law of Texas was controlling (the contract was negotiated and became effective in Texas).

The United States District Court for the District of Columbia granted petitioner's motion for summary judgment. On November 15, 1962 the U. S. Court of Appeals for the District of Columbia affirmed the lower court in an unanimous decision. Thereafter a petition for rehearing was granted and the matter reargued. On

April 25, 1963, the division rendered a 2-1 decision, this time reversing itself and the lower court. The original unanimous opinion, slightly changed, became the minority opinion. Petitioner filed for rehearing en banc and this was denied by the court on May 28, 1963.

REASONS FOR GRANTING THE WRIT

The Circuit Court has refused to follow the law of Texas which both parties agree is controlling.

The critical policy provision provides coverage only in vehicles which transport passengers for hire, and, which are duly licensed for this purpose. Unequivocally the law of Texas states that a drive-ur-self vehicle does not transport passengers for hire. Indeed, in the most recent Texas decision defining the driverless automobile business (here Hertz), *City of Corpus Christi* v. *McClaugherty*, (1955), 284 S.W. 2d 927, the court stated, "The driverless automobile business *does not transport passengers for hire*, but simply rents automobiles to be used by the person renting the same for any purpose which he might see fit." This was the decision of an intermediate appellate court; however, a Writ of Error to the Supreme Court of Texas was applied for and returned "refused". A "refused" application means that the Supreme Court not only approves of the decision, but the language as well, (TEX. CIV. PROCEDURE, Rule 438, *Myers* v. *Martinez*, 326 S.W. 2d 71, *Ohler* v. *Trinity*, 181 S.W. 2d 120. Thus, the decision becomes the law of Texas.

The *McClaugherty* decision was not unique. An earlier Texas case, *Campbell* v. *Groh*, (Tex. Civ. App.), 8 S.W. 2d 712 had expressed the same opinion:

> These automobiles are used for the purpose of hire to those who wish to use them, without any

> driver, and for their own use, and not in transporting passengers for fares.

Other jurisdictions concur. *Armstrong* v. *Denver Saunders System*, 84 Colo. 138, 268 P. 976 (1926); *People* v. *Hertz Drive Ur Self Stations, Inc.*, 338 Mich. 139, 61 N.W. 2d 113 (1955); and *State* v. *Dabney*, 176 Ark. 1071, 5 S.W. 2d 304 (1928).

Yet the Court below, after dismissing the decisions cited by respondent (*City of Corpus Christi* v. *Texas Driverless Co.*, 144 Tex. 288, 190 S.W. 2d 484 and *City of San Antonio* v. *Besteiro*, 209 S.W. 472) on the critical issue as being "of little assistance", ruled that, notwithstanding the language of the *McClaugherty* and *Groh* cases, and despite the fact they and those of other jurisdictions, lent "persuasiveness" to petitioner's contention, "they are not controlling." The Circuit Court thus rejected binding decisions which it was required to follow.

The majority noted that the *McClaugherty* and *Armstrong* cases involved the construction of tax statutes, which are to be construed narrowly, favoring the person sought to be taxed. It further noted that in construing insurance policies the opposite is true, an insurance policy is to be construed broadly, favoring the insured, and where there is an ambiguity "doubt should be resolved in favor of the insured." The opinion concludes:

> ". . . moreover, at the time of the accident he was not being driven by a friend or using a car of his own. He was traveling in the type of vehicle readily available for hire to the traveling public on such a trip as he was making. He hired it for the transportation of himself, and under the *Warren* (*Continental Casualty Co.* v. *Warren*, 152 Tex.

> 164, 254 S.W. 2d 726) decision he should be considered a passenger . . . all these circumstances *tend* (emphasis added) to bring the events which occurred within those intended to be insured against. Though we cannot say the policy clearly covers the case or that the construction adopted by the District Court is not a reasonable one, we cannot escape the conviction that the circumstances which transpired, considered with the language of the policy, give rise to a considerable doubt that the courts should read the policy to exclude this accident from its coverage . . ."

Petitioner accepts the aforementioned tenets of construction concerning insurance contracts and tax statutes, but as stated in the opinion of the District Court, and quoted by the dissenting Judge,

> ". . . This does not mean that a tortured interpretion must be attached to a provision of the policy that is not ambiguous on its face merely in order to favor the insured".

The Supreme Court of Texas has spoken (*McClaugherty, supra*). It has interpreted the same language as is presented in the case at bar, it has decided the same issue, namely, that a driverless type vehicle does not transport passengers for hire. The court below cannot ignore this decision, nor may it, with justification, seek to distinguish the *McClaugherty* opinion on the ground that involved in the decision was the construction of a tax statute, for this matters not. The import of *McClaugherty* and *Groh* is that they defined the status of the Hertz-type vehicle, and, perhaps more important for present purposes, they held the driverless automobile business does *not* transport passengers for hire.

The remainder of the majority's opinion, (quoted above) as will be seen, completes the exercise in fallacious rationale, by again distorting the law of Texas, ignoring the meaning to everyday words that common sense imports, and failing to analyze in proper content the critical phrase.

Policy provision (*c*) requires the conveyance to be "licensed" for the transportation of passengers for hire. The majority opinion acknowledges the vehicle driven by the decedent was licensed by the State of Louisiana only "to cover a personal use passenger car", but the majority brushes the requirement aside by stating, "the car, however, *was hired* (emphasis supplied) to the decedent".

The distinction drawn is spurious, the point is not whether he was able to hire this vehicle (which is the business of Hertz) but whether the vehicle displayed license plates of a "transportation of passengers for hire" type vehicle. And it did not, although not mentioned in the opinion. In Louisiana, where the vehicle was rented, an entirely different type license plate is required for vehicles transporting passengers for hire. (L.t. Stat. Anno., Sec. 45:181). The critical provision also uses the word "passengers". But the opinion disregards its common meaning and stretches the holding of the *Warren* case to the point of distortion. In that decision the Supreme Court of Texas held the word "passengers" did not exclude the pilot of a plane (the minority vigorously dissented) but the decision did not hold the terms "driver" and "passenger" to be synonymous or interchangeable in land conveyances. Nevertheless, the majority states "under the *Warren* decision he should be considered a passenger".

And finally, petitioner submits, the entire phrase, "licensed for the transportation of passengers for hire" clearly demonstrates that coverage was not afforded to a conveyance driven by decedent himself, it excludes private use vehicles, and as stated in the dissenting opinion, the phrase "obviously refers to duly licensed taxicabs, airport limousines, airport buses, and similar types of vehicles."

CONCLUSION

The Court's decision on rehearing is clearly wrong. It disregards the controlling Texas decisions and is utterly without foundation in law. The Supreme Court of the United States should grant this Petition and thereafter set aside the erroneous decision of the court below.

RICHARD W. GALIHER
WILLIAM E. STEWART

Of Counsel:
HARVEY B. BORDON, JR.